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No. 07-244

78

IN THE
SUPREME COURT OF THE UNITED STATES

QIAN GAO,
Petitioner,

v.

MICHAEL MUKASEY, Attorney General
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

I. THE FUGITIVE DISENTITLEMENT DOCTRINE APPLIES ONLY TO THOSE WHO FALL WITHIN THE SCOPE OF THE STATUS, "FUGITIVE," AS PETITIONER DOES NOT, THE DOCTRINE IS INAPPLICABLE, AND ITS USE, IN ERROR.

A. As Petitioner Did Not Flee Custody, The Use Of The Term Fugitive, And Concomitantly, The Fugitive Disentitlement Doctrine Is In Error.

As the Court of Appeals for the Second Circuit (hereinafter "Second Circuit") noted when the instant matter appeared before it; "[t]he fugitive disentitlement doctrine is an equitable doctrine that provides courts with discretion to dismiss the appeal of a defendant or petitioner who is a fugitive from justice during the pendency of the appeal." *Gao v. Gonzales*, 481 F.3d 173, 175 (2d Cir. 2007). In coming to the conclusion that the Federal Disentitlement Doctrine (hereinafter "FDD") was applicable to Mr. Gao, the Second Circuit extended the doctrine from its paradigmatic application, that of a fugitive fleeing while his appeal is pending, to that of an alien failing to comply with a notice to surrender for deportation (*Id.* at 175-176). In doing so, the Second Circuit relies on its precedential

decision of, *Bar-Levy v. United States Dep't of Justice, INS*, 990 F.2d 33, 35 (2d Cir. 1993).

This Honorable Court, however, explicitly refrained from making such an expansion to the term "fugitive" in *Degen v. U.S.*, deciding the case, but at the same time to declining to resolve "whether Degen is a fugitive in all the senses of the word debated by the parties." 517 U.S. 820, 828 (1996). Additionally, in earlier decisions, both the Second Circuit and the Ninth Circuit Courts of Appeals have found ambiguity with regard to the term fugitive as it would apply to an alien in Mr. Gao's circumstances.

The Ninth Circuit, in attempting to explain how someone who, like Mr. Gao did not flee custody, but rather remained in his home, his location known to the government, could be deemed a fugitive said; "[a]lthough an alien who fails to surrender to the INS despite a lawful order of deportation is not, *strictly speaking*, a fugitive in a criminal matter, we think he is nonetheless *a fugitive from justice*." *Antonio-Martinez v. INS*, 317 F.3d 1089, (9th Cir. 2003), citing *Zapon v. U.S. Department of Justice*, 53 F.3d 283, 285 (9th Cir. 1995); *Bar-Levy v. United States Dep't of Justice, INS*, 990 F.2d 33, 35 (2d Cir. 1993). (Emphasis added). Similarly, the Second Circuit also redefined the meaning of the term "fugitive" saying in *Ofosu v. McElroy*, "he is a fugitive *in the sense* that the INS must deploy resources to bring him in." *Ofosu v. McElroy*, 98 F.3d 694, 700 (2d Cir. 1996). (Emphasis added). That these Courts felt compelled to redefine the term

fugitive, parsing its meaning into disparate "senses," and categories, e.g., "fugitive from justice," in order to apply the FDD to a non-reporting alien, highlights the incongruence between the "paradigmatic" model and Mr. Gao's case.

While the Respondent properly asserts that *Degen* does not preclude the application of the FDD in civil matters, it fails to address this Honorable Court's prior eschewance with regard to defining the scope of the states encompassed by the term "fugitive." The consequence of this silence is an exercise in semantical gymnastics by the Ninth and Second Circuit Courts. The resulting definitions, "an alien who fails to surrender... is not, *strictly speaking*, a fugitive in the criminal matter," "fugitive, *in the sense...*" and "fugitive *from justice...*" are illustrative of the need for explication by this Honorable Court in this matter.

It is worthwhile to note that apparently even the Second Circuit Court disagrees with the Ninth Circuit Court's definition of "fugitive from justice."[1] To wit, in *Collazos v. United States*, the Second Circuit Court said, "[a] fugitive from justice has been defined as '[a] person who, having committed a crime, flees from [the] jurisdiction of [the] court where [a] crime was committed or departs from his usual place of abode and conceals himself within the

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[1] In the case at bar the Second Circuit calls Mr. Gao a "fugitive from justice." Neither the reason for the expansion nor an acknowledgment of it is provided. *Gao v. Gonzales*, 481 F.3d at 176 citing *Bar-Levy v. United States Dep't of Justice, INS*, 990 F.2d 33, 35 (2d Cir. 1993)

district.'" 368 F.3d 190, 195-196 (2d Cir. 2004) citing *Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 281 (2d Cir. 1997) (quoting Black's Law Dictionary 604 (5th ed. 1979)). Such a definition is in direct accord with the paradigmatic example of a "fugitive" (one who flees while an appeal is pending) and in direct opposition to Mr. Gao's circumstances (not flight taken), and the Ninth Circuit Court's definition of a "fugitive from justice."

Moreover, Petitioner asserts that not only did he not flee from justice; he was never even aware of being called into custody and challenges the veracity of the signature on the "bag and baggage" letter receipt. Admittedly, Petitioner did not raise the issue of the falsified signature before the Second Circuit. However, as the application of the FDD, and consequently, Mr. Gao's status as a "fugitive," only became an issue after the Second Circuit's decision, there was no need to raise the defense. Conversely, and contrary to the Respondent representation, once the Second Circuit foreclosed Mr. Gao's appeal he noted his challenge of the receipt, stating; "[t]he Immigration and Nationality Service alleges that it issued a notice for Mr. Gao to surrender himself for deportation, which Mr. Gao never received." (Pet. 2). Petitioner therefore respectfully asserts that he is not foreclosed from raising this defense and that he is neither a fugitive, nor a "fugitive from justice."

In fact, in a decision subsequent to the matter at bar the Second Circuit, in deciding whether application of the FDD was proper used the following reasoning; "Huang has neither denied

receiving notice of the order nor explained her failure to comply. Under these circumstances, we find it appropriate to invoke the fugitive disentitlement doctrine and dismiss Huang's petition for review." *Xian Chai Huang v. United States DOJ*, 231 Fed. Appx. 52, 54 (2d Cir. 2007). That Mr. Gao's denial of receiving notice and his subsequent explanations as to his failure to comply are not taken into consideration in his case, but yet, are the determining factors regarding application in a case decided by the same court, a decision that even cites to the case at bar, brings into sharp relief, the inconsistencies behind its current application.

B. Application Of The FDD In The Instant Case Would Violate Petitioner's Fifth Amendment Rights

It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. See *Reno v. Flores*, 507 U.S. 292, 307 (1993); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). At stake in asylum proceedings is the potential deprivation of a significant, constitutionally protected liberty interest, and often – more poignantly – the very life and freedom of the Petitioner. Accordingly, removal proceedings must be conducted in a manner which upholds the principles of fundamental fairness and substantial justice. See *Bridges v. Wixon*, 326 U.S. 135 (1945); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987);

Harisiades v. Shaughnessy, 342 U.S. 580 (1952); *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

As such, application of the FDD in this case, where the subject is not, in fact, a fugitive, represents not only an abuse of the doctrine, but also an abridgment of Mr. Gao's Constitutional, Fifth Amendment rights. Respondent is quick to point out (Res. 8) that "disentitlement comports with due process in civil contexts just as it does in criminal cases." However, regardless of the purported accord between the two, it is clear that disentitlement is does not comport, in any context, when the subject of the sanction is himself, not a fugitive.

II. EVEN IF PETITIONER IS IN FACT DEEMED A FUGITIVE, APPLICATION OF THE FDD IS IMPROPER.

A. The Use Of The Fugitive Disentitlement Doctrine Is Unnecessary And It's Application Is Therefore Improper

As this Court noted in Degen, "[a] court's inherent power is limited by the *necessity* giving rise to its exercise." (829) (Emphasis added). Mr. Gao has never made any attempt to hide from the federal government. He has gotten married and filed a marriage certificate, he has had children and filed their birth certificates. He has made himself

available to the government. Consequently, the use of the FDD is excessive and therefore, not in line with the guidelines set forth in *Degen*. In *Degen*, the court found that the circumstances were such that "[t]here was no necessity to justify the rule of disentitlement." (Ibid.). Petitioner asserts that such is true in his case as well.

In *Bhasin v. Gonzales*,[2] the court denied application of the FDD pointing out that there were significant differences between the circumstances of the case and that of *Matter of Barocio*,[3] an agency decision relied on by the Board of Immigration Appeals. In *Baroccio*, the Court notes, in addition to a signed receipt the "agency also detailed its efforts to locate the respondents, including attempts to locate them at "their last known address, the male respondent's last known place of employment, the postal service, the California Department of Motor Vehicles, and the local gas and telephone companies.'" *Bhasin v. Gonzales*, 423 F.3d 977, 988-989 (9th Cir. 2005) citing *Matter of Barocio*, 19 I. & N. Dec. 255, 256 (BIA 1985). The Court then declines to apply the FDD in Mr. Bhasin's case, saying; "[w]e find no such deliberate flouting of the immigration laws in the present case." (Ibid.). Similarly, no such attempts were made to locate Mr. Gao either. In fact, if the agency had attempted to find Mr. Gao, they would have found him at home, at the address they had in their possession. The need

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[2] 423 F.3d 977 (9th Cir. 2005)

[3] 19 I. & N. Dec. 255 (BIA 1985).

for the application of the FDD is therefore, lacking as well.

To highlight this lack of necessity Petitioner again points to the rarity with which the doctrine is applied in cases with circumstances such as his own. The fact that Circuit Courts have felt comfortable adjudicating their cases without relying on the doctrine, not only underscores the practicality of the endeavor, but addresses the superfluous nature of the application of the FDD in the instant matter.

Furthermore, the Second Circuit's contention that application of the FDD is necessary because the "INS must deploy resources to bring him in[,]" is, in fact, not an argument as to the necessity of the doctrine but rather, as to the economy of resources in adjudicating similar claims. Petitioner does not challenge the assertion, that in certain circumstances the government may be able to conserve its resources by allowing for a more liberal use of judicial sanctions. Petitioner does, however, dispute the rectitude of this purported justification. This Court clearly stated that the Federal Disentitlement Doctrine is to be used only when its application is deemed necessary; when it is *necessary*, not when it is convenient, not when it is expedient and certainly not when it is cost-effective.

The Respondent may contend that, in addition to its utility in conserving government resources, the application of the FDD serves to protect the dignity of the court in matters such as these. This Court, however, already addressed such a defense, saying; "[i]t remains the case, however, that the sanction of

disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked." *Degen v. U.S.*, 517 U.S. at 828. This is even truer where, as here, the application of the FDD is unnecessary and seemingly arbitrary. The application of the Fugitive Disentitlement Doctrine would result in, exactly as this Court cautioned in *Degen*, respect for the court being "eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." (Ibid.). Additionally, the resulting removal would leave United States citizen children without a father, a family without financial support, and new mouths dependant on government welfare. If the government pursues application of the doctrine to conserve resources, surely this expense should factor into their calculation.

It is important to remember, as the Ninth Circuit highlighted; [t]he disentitlement doctrine, however, is not one of jurisdictional dimensions, but rather one based on equitable considerations. *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1054 (9th Cir. 1991) See *United States v. Sharpe*, 470 U.S. 675, 681 n.2, (1985) (disentitlement doctrine is "based on . . . equitable principle[s]"). The equities here demand for a hearing on the merits of Mr. Gao's claim. Accordingly, Petitioner respectfully asserts that the Second Circuit failed to follow the guidelines set forth for proper application of the FDD and abused their discretion in applying the Fugitive Disentitlement Doctrine in this case.

CONCLUSION

This Court should grant Petitioner's writ of certiorari and schedule this matter for briefing and oral argument, in order to address the scope of the Fugitive Disentitlement Doctrine and to ensure Mr. Gao the opportunity to have the merits of his meritorious appeal reviewed.

Respectfully submitted,

BY: /s/

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